APR 16 1946
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CLERK

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1123

JOHN M. HARTZBERG and LOUIS HARTZBERG, copartners doing business under the firm name and style of J. & L. HARTZBERG,

Petitioners,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

HENRY H. SHEPARD,
JOSEPH M. PROSKAUER,
Counsel for John M. Hartzberg and Louis Hartzberg, copartners doing business under the firm name and style of J. & L. Hartzberg,
Petitioners.

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THE NEW YORK CENTRAL RAILROAD COMPANY,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

To the Honorable the Chief Justice of the Supreme Court of the United States of America and the Honorable Associate Justices thereof:

Your petitioners, John M. Hartzberg and Louis Hartzberg, copartners doing business under the firm name and style of J. & L. Hartzberg, submit this, their petition, for a writ of certiorari to review the judgment and order of the Court of Appeals of the State of New York, and the judgment entered thereon in the office of the Clerk of the Supreme Court of the State of New York, County of New York, which affirmed the judgment of affirmance entered in the office of the Clerk of the Supreme Court of the State of New York, County of New York, entered upon the order

of affirmance of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, which affirmed a judgment of the Supreme Court of the State of New York, County of New York, in the sum of $141.87 in petitioners' favor for respondent's grossly negligent loss of petitioners' jewelry salesman's sample trunk containing jewelry samples of the value of $169,078.47 (R. 41).

Opinions Below

The opinion of the Supreme Court of the State of New York, County of New York, appears at R. 31, and is reported in 181 Misc. 129, 41 N. Y. S. 2d, 345. No opinion was delivered by either the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 387, 389; 268 App. Div. 904, 51 N. Y. S. 2d, 741; 268 App. Div. 978, 52 N. Y. S. 2d, 741) or the Court of Appeals of the State of New York (R. 391, 294 N. Y. 641, Remittitur R. 394, 295 N. Y. 703).

Jurisdiction

The judgment and order of the New York Court of Appeals was entered on January 19, 1946 (R. 394) and the judgment of the Supreme Court of the State of New York, New York County, was entered thereon on February 7, 1946 (R. 397). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended (28 U. S. C. A., Sec. 344 (b)).

Questions Presented

This case arises out of the loss of petitioners' jeweler's sample trunk, containing jewelry samples of the stipulated worth of $169,078.47 (R. 163), stolen by reason of respondent's gross negligence from its Michigan Central Station baggage room at Detroit, Michigan, where it had

been delivered by a local transfer company to be held by respondent in local storage under the transfer company's private claim check, until further instructed, pursuant to the claim-check system maintained at the station, before the making of any arrangements for checking such trunk for transportation as baggage, and before the time when value could have been or had to be declared therefor.

The State court held that the Interstate Commerce Act and the respondent railroad common carrier's baggage tariff rules filed thereunder with the Interstate Commerce Commission whereby respondent's liability for property delivered to it was limited in the absence of a declaration of higher value, were applicable, to the exclusion of the prevailing law and public policy of Michigan, to limit petitioner's recovery to $141.87.

Questions of the scope and construction of the Interstate Commerce Act, the Carmack and Cummins Amendments thereto and the regulations filed thereunder, are directly presented—specifically, whether Congress intended the Act and the Carmack and Cummins Amendments thereto (49 U. S. C. A., sec. 20 (11)) to permit respondent to limit its liability for property accepted by it at its station baggage room to be held by it in local storage as bailee, before an opportunity was afforded to declare a higher value and before being checked for transportation, merely because of the owner's undisclosed intention thereafter to check such property for interstate transportation as baggage, in the usual course, without declaration of a higher value.

Statement

Petitioners' salesman, Brodie (R. 47), intending later that evening to acquire a passenger ticket from Detroit, Michigan, to Cleveland, Ohio, and to check thereon as baggage the jeweler's sample trunk (R. 95-97), caused it to be delivered from his hotel in Detroit, by a local transfer company, to the baggage room floor of the Michigan Cen-

tral Station (R. 68-69), leased and controlled by respondent (R. 242), where respondent was accustomed to receive property and baggage, and did accept the sample trunk, before being checked for transportation (R. 242). Respondent negligently permitted the trunk to be stolen about 40 minutes after it had been delivered, it being at that time merely consigned to the Michigan Central Station (R. 180), to be held by respondent on only the transfer company's private claim check (R. 233-4). The only receipt ever issued by respondent for the trunk was the special receipt issued to transfer companies upon acceptance of such a trunk pursuant to the claim-check system maintained at this station (R. 178-9). The receipt described the trunk as a sample trunk, stated its weight, its point of origin as the Statler Hotel, its destination as the Michigan Central Station and set forth the number of the transfer company's private claim check upon surrender of which the trunk would be checked or redelivered (R. 144, 150-1, 339).

Under the claim-check system maintained at its Michigan Central Station in Detroit, Michigan, respondent accepts into its baggage room, when delivered by the local transfer company, trunks belonging to customers of the transfer company, with only the transfer company's private claim check attached, without first requiring presentation of transportation, without first requiring such trunks to be checked for transportation as baggage, without knowledge or inquiry as to whether the owner has purchased or intends to purchase a railroad ticket to any destination, and without knowledge or inquiry whether any such destination is to be interstate or intrastate (R. 233-4). Under this system, respondent undertakes to hold such trunks until further instructed by the holder of the duplicate transfer company check, without requiring surrender of the receipt issued to the transfer company or any further identification (R. 259). Under this system, the owner of the trunk may appear at the station at any time at his convenience (within 30 days after storage charges commence), present

his train ticket and the duplicate of the transfer company's check, and thereby deliver the trunk to be checked for transportation, whereupon, for the very first time, he is afforded an opportunity to make a declaration of value, or he may reclaim the trunk. If the trunk is claimed without presentation of transportation, storage charges from time of receipt are collected, otherwise a charge is made for storage after the first 24 hours (R. 185-6, 373). If not claimed within 30 days after storage charges commence, the trunk is forwarded to the "unclaimed warehouse" and held subject to further storage charges.

Rule 14 of respondent's baggage tariff entitled "Storage" provides (Rule 14 (e)) that "all baggage or property stored with the transportation line will be held by it in the capacity of warehouseman only" (R. 373). Under respondent's baggage tariff rules, the presentation of transportation is required before a trunk can be checked for transportation as baggage (R. 365). Prior to the time that a trunk has been so checked, under the baggage tariff rules and respondent's practice, no opportunity exists for any declaration of value and none would be accepted (R. 234, 248, 249, 258-265). In no event, under the baggage tariff rules, may value in excess of $2500 be declared at any time (R. 369, 370, 372), the only alternative being to ship as freight under another tariff at a higher valuation, although by its baggage tariff, respondent undertakes to accept, check and transport jewelry samples as sample baggage (Rules 4 (c), 4 (d) and 9, as supplemented by Tariff Supplements 6 and 12).

Petitioners instituted an action in the New York State courts to recover the entire value of their trunk and contents on the theory the respondent was liable therefor upon a local bailment subject to the local law of Michigan (R. 7-21), under which law respondent would be liable for the full value of the trunk and contents and could not invoke a tariff rule limitation of liability based upon a failure to declare a higher value (*Compiled Laws of Michigan,*

1929, Sections 11019, 11023, 11056, 11126, 11518, 9623, 9566; *Feige* v. *Michigan Central R. R. Co.*, 62 Mich. 1; *Crowley Bros.* v. *Grand Trunk R. Co.*, 185 Mich. 482; *Farnsworth* v. *National Express Co.*, 166 Mich. 676).

Respondent contended that its liability was that of an interstate common carrier in that the delivery of the trunk to it and its custody thereof were incident to a contemplated interstate transportation of the trunk as baggage, that its baggage tariff rules filed with the Interstate Commerce Commission governed, that such tariff provisions limit its liability to value of $100 for 150 pounds of baggage, unless a higher value is declared, and that no value was declared (R. 25-28).

The New York Supreme Court upheld respondent's view (R. 31-40) and judgment was entered in its favor on its third and fourth partial defenses limiting petitioners' recovery to $141.87 (R. 41), which judgment was affirmed by the Appellate Division of said Supreme Court (R. 387) and by the Court of Appeals (Remittitur, R. 394). The State court held that Federal law was applicable to the exclusion of State law, that under Federal law the tariff rule limitations may be validly invoked to limit the respondent's liability for the loss herein and that under Federal law petitioners could have obtained full coverage for their property by shipping the same as freight (R. 31-40).

Specification of Errors

The New York Court of Appeals, in affirming the judgment of affirmance entered upon the order of the Appellate Division of the Supreme Court of the State of New York, First Department, affirming the judgment of the Supreme Court of the State of New York, County of New York, erred:

1. In holding that the Interstate Commerce Act and the tariff rules filed thereunder with the Interstate Commerce Commission govern, to the exclusion of State law, the ex-

tent of a railroad carrier's liability for property lost by its negligence while held in local storage in its station baggage room, subject to a transfer company's private claim check pursuant to a claim-check system maintained at the station, and before being checked for interstate transportation, and in failing to hold that such liability is governed by local State law and public policy.

2. In holding that the limitation of liability permitted by the Second Cummins Amendment with respect to "baggage carried on passenger trains or boats, or trains or boats carrying passengers" extends to liability for property held in "every phase logically or reasonably connected with such transportation from the time of its initial delivery to the carrier" including liability for property held in a service which is not "necessarily incidental" to shipment, and in failing to hold that limitation of liability was permitted for baggage only upon being checked for interstate transportation before which it could not be deemed to come within the "baggage carried" exception of the Second Cummins Amendment.

3. In holding that said limitation of liability is available to a carrier who has accepted and negligently lost a trunk before affording the prospective passenger an opportunity to declare and pay for a higher declared value, and in failing to hold that until the prospective passenger has checked his trunk for interstate transportation and had been afforded such an opportunity to declare a higher value the carrier may not invoke its baggage tariff rules to limit its liability for property received and held in its custody.

4. In holding that said limitation of liability is available to a carrier whose tariff, as here, prohibited the declaration of any value in excess of $2500 for jeweler's sample trunks when checked as sample baggage, and in failing to hold that such a limitation of liability was not available where the carrier's tariff prohibited the baggage to be declared and paid for at its full value.

Reasons Relied on for the Allowance of the Writ

1. Novel and vital questions of Federal law never before decided by this Court, as to the scope, construction, and application of the Interstate Commerce Act, the Carmack and Cummins Amendments thereto, and of baggage tariff rules filed thereunder, are involved, to wit:

(a) May a carrier limit its liability under the Act as to property accepted before it has made any contract of carriage therefor, *i. e.*, while it has custody of the property under a local storage bailment, which may or may not ripen into a contract of carriage, when State law prohibits such limitation?

(b) May a carrier limit its liability under the Act for property accepted by it as bailee for local storage, because of a prospective passenger's undisclosed intention thereafter to enter into a contract for interstate transportation of such property?

(c) May a carrier limit its liability under the Act, as to property accepted without any contract of carriage on the assumption that a duty rests on a prospective passenger to declare full value on delivery when the carrier would not permit or accept any such declaration until the making of a contract of carriage?

(d) May a carrier limit its liability under the Act because of a failure to declare full value for the contents of a jeweler's sample trunk which it accepts as sample baggage where its published baggage tariffs prohibit such full declaration?

2. The State court has decided these questions in a way probably not in accord with applicable decisions of this Court.

3. The State court has erroneously interpreted and applied decisions of this Court on questions of Federal law.

The State court incorrectly relied on *Boston & Maine R.R. Co.* v. *Hooker*, 233 U. S. 97, and *Galveston &c. Ry. Co.* v. *Woodbury*, 254 U. S. 357. These were cases of checked baggage, and come within the "baggage carried" exception. (See *Atlantic Coast Line R. Co.* v. *Barksdale*, 32 Ga. App. 643.) The *Hooker* case merely held that baggage actually checked and transported on an interstate ticket did not cease to be subject to the Act until called for and taken away by the passenger. Storage awaiting such call is so "necessarily incidental" to shipment (*Cleveland C. C. & St. L. R. Co.* v. *Dettlebach*, 239 U. S. 588, *Southern R. Co.* v. *Prescott*, 240 U. S. 632), as to be fairly embraced within the words "baggage carried."

Here, however, the storage facility afforded prior to the making of any contract of carriage—indeed, a contract of carriage might never have been made (*cf. Federal Compress Co.* v. *McLean*, 291 U. S. 17, 21, 22)—should not be held so "necessarily incidental" to shipment as to be fairly embraced within the words "baggage carried".

Moreover, such storage does not even come within the statutory definition or contemplation of "transportation" (49 U. S. C. A., Sec. 1 (3)). Close analogies in Federal Circuit courts and other State courts reinforce this construction, holding only those services included as are necessarily incidental to shipment and excluding services which the law does not require a common carrier to perform (*Pennsylvania R. Co.* v. *M. McGirr's Sons Co.*, 287 Fed. 334, cert. denied 262 U. S. 743; *Aron* v. *Pennsylvania R. Co.*, 80 F. 2d 100, cert. denied 298 U. S. 658; *Walling* v. *Baltimore Steam Packet Co.*, 144 F. 2d 130), such as the service of accepting and holding trunks delivered by a transfer company to a railroad baggage room under the claim check system heretofore described (*State* v. *Jacksonville Terminal Co.*, 90 Fla. 721, 755; *Atlanta Terminal Co.* v. *American Baggage & Transfer Co.*, 125 Ga. 677, 680, 687-8), which is governed not by baggage tariff rules filed with the Interstate Commerce Commission, but by State law (*Birmingham Terminal Co.* v. *Thomas*, 207 Ala. 363).

The claim-check system has been described by these cases as founded on a practice which wholly precedes the creation of the relation of passenger and carrier—as the simple matter of storage of parcels before the prospective passenger qualifies to become a passenger and before he tenders his parcel to be checked as baggage—which has no relation to the duty of carriage founded on the contract for passenger transportation. The apt analogy is to a parcel room bailment (*Milwaukee Mirror & Art Glass Works* v. *Chicago M. & St. P. Ry. Co.*, 148 Wis. 173; *Fraam* v. *Grand Rapids &c. Ry. Co.*, 161 Mich. 556) and must be construed to be excluded from the definition of transportation of property declared by the Interstate Commerce Act (49 U. S. C. A., Sec. 1 (2) (a)) (*Denver Union Terminal R. Co.* v. *Cullinan*, 72 Colo. 248).

But even if such storage facilities, as were here afforded in anticipation of a possible future contract of interstate carriage, be deemed within the Act (*cf. Bracht* v. *San Antonio & A. P. R. Co.*, 254 U. S. 489; *Gulf C. & S. F. R. Co.* v. *Texas*, 204 U. S. 403; *New York Central R. Co.* v. *Mohney*, 252 U. S. 152; *Southern Pacific Co.* v. *Arizona*, 249 U. S. 472; *Federal Compress Co.* v. *McLean*, 291 U. S. 17) and within the "baggage carried" exception, the carrier here cannot limit its liability under the Act because it failed to afford an adequate opportunity voluntarily to declare and pay a higher value (*Caten* v. *Salt City Movers & Storage Co.*, 149 F. 2d, 428, 432). The trunk was negligently lost before any contract of carriage was ever made and, admittedly, no declaration of higher value could have been made and none would be accepted until a contract of carriage had been concluded. Obviously, no duty rested on the putative passenger to make such a contract of carriage by checking the trunk for transportation as baggage before delivering the trunk to the baggage room floor under the claim-check system. Nor would a declaration of full value of a jeweler's sample trunk have been accepted, if sought to be made, since the tariff rules forbade declaration in excess of $2500 for any baggage. Nor was the privilege to ship as

freight at a higher declaration an adequate substitute for the right to check as baggage upon declaring a higher valuation and paying for the increased risk (*The Kensington*, 183 U. S. 263). The carrier may impose a higher charge for a larger risk (*N. Y. C. & H. R. R. Co.* v. *Fraloff*, 100 U. S. 24, 27; *National Baggage Committee* v. *A. T. & S. F. Ry. Co.*, 32 I. C. C. 152; *Re Cummins Amendment*, 33 I. C. C. 682, 696), but no exemption from liability in excess of $2500 for negligence can be exacted by the carrier for baggage, no matter what the amount may be (49 U. S. C. A., Sec. 20 (11)) provided the excess be stated. The carrier must take and carry the baggage, "be the value what it may" (*Baum* v. *Long Island R. R. Co.*, 58 Misc. 34, 43). To compel jewelry salesmen to ship their sample trunks as freight in order to obtain full protection would frustrate the very purpose of the Interstate Commerce Commission in promulgating the definition of sample baggage set forth in the carrier's baggage tariffs to accommodate the jewelry trade which could not function if the salesmen were not permitted to check their distinctive jewelry sample trunks as baggage but were required to use express or freight facilities. (*Jewelers' Protective Union et al.* v. *Pennsylvania Railroad Co. et al.*, 36 I. C. C. 71, R. 346-354.)

The State court incorrectly construed and defined the field occupied by the Federal legislation regulating interstate commerce in excluding the effect of State law and policy upon the amount of the carrier's liability for a local intrastate activity, which preceded and did not necessarily relate to the contemplated interstate shipment (*Federal Compress Co.* v. *McLean*, 291 U. S. 17, 21; *Missouri Pacific R. Co.* v. *Porter*, 273 U. S. 341; *Terminal R. Ass'n.* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1, 4; *Parker* v. *Brown*, 317 U. S. 341, 361, 363; *Cloverleaf Co.* v. *Patterson*, 315 U. S. 148, 153-6; *Duckworth* v. *Arkansas*, 314 U. S. 390, 394-5; *California* v. *Thompson*, 313 U. S. 109, 113-4). The Carmack Amendment applies only to the liability for property received for transportation from a point in one State to a point in another State. By 49 U. S. C. A., Sec. 1 (6)

the carrier's duty to establish regulations and practices affecting any service with respect to baggage is limited to "carrying". The requirements of Sec. 1 (6) and Sec. 6 (1), with respect to regulations affecting "storage" and the statement of all "storage charges" in the carrier's schedules, are limited to carriers "subject to the provisions of this chapter" and "all traffic, transportation and facilities defined in this chapter." Congress indicated its intent to subject to the Act the services of "receiving", "storage" and "handling", when rendered with respect to "property transported" (49 U. S. C. A., Sec. 1 (3)) and to exclude from the application of the Act the identical services with respect to "property wholly within one state" (49 U. S. C. A., Sec. 1 (2) (a)).

The cases of *Boston & Maine R. R. Co.* v. *Hooker,* 233 U. S. 97; *Cleveland C. C. & St. L. R. Co.* v. *Dettlebach,* 239 U. S. 588; *Southern R. Co.* v. *Prescott,* 240 U. S. 632, and *Galveston &c. Ry. Co.* v. *Woodbury,* 254 U. S. 357, cited by the State court, all involved "property transported". It is obvious that storage of property before transportation has begun, which is never checked for transportation or transported is not storage included within the Act by Sec. 1 (3) but is storage excluded from the Act by Sec. 1 (2) (a) (*Denver Union Terminal R. Co.* v. *Cullinan,* 72 Colo. 248). Manifestly, it is not subject to the limitation provisions of a baggage tariff filed with the Interstate Commerce Commission to the exclusion of State law and policy (*Birmingham Terminal Co.* v. *Thomas,* 207 Ala. 363; see *Pennsylvania R. Co.* v. *Hughes,* 191 U. S. 477; *Chicago &c. R. R. Co.* v. *Solan,* 169 U. S. 133).

4. The questions involved are of great importance to all railroads and persons contemplating the use of railroads. The record portrays that over 30,000 pieces of baggage were handled at the respondent's Detroit station alone, during the month of June, 1941, that the average length of time such property was held in the baggage room between delivery and final disposition was approximately six hours at

the longest, and that about one-half of one percent remained twenty-four hours before being checked out (R. 258). The record also discloses that at least 7000 jewelry salesmen use the railroads to receive, carry, store and handle their distinctive jeweler's sample trunks containing samples of substantial value (R. 347). The rights and liabilities of the respective parties and the quantity of protection that may be gained for such property while held in the baggage room before being checked for transportation present Federal questions of vital importance which should be determined by this Court.

Conclusion

Wherefore, it is respectfully submitted that the important and serious Federal questions involved and inherent herein require that they be authoritatively resolved and settled by this Court, in the public interest, that this petition for a writ of certiorari to the Supreme Court of the State of New York, County of New York, should be granted to review the judgment and order of the New York Court of Appeals and the judgment entered thereon in the Supreme Court of the State of New York, County of New York, and that the said judgments should be reversed.

HENRY H. SHEPARD,
JOSEPH M. PROSKAUER,
Counsel for John M. Hartzberg and Louis Hartzberg, copartners doing business under the firm name and style of J. & L. Hartzberg,
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April 15th, 1946.

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S OPPOSING BRIEF

FREDERICK L. WHEELER,
Attorney for Respondent,
466 Lexington Avenue,
New York 17, N. Y.

C. AUSTIN WHITE,
of Counsel.

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RESPONDENT'S OPPOSING BRIEF

Official Report of Opinion Below

The opinion of the Supreme Court of the State of New York, County of New York, appears at R. 31 and is reported in 181 Misc. 129. Both the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and the Court of Appeals of the State of New York unanimously affirmed, without opinion (R. 387-9; 268 App. Div. 904; 268 App. Div. 978; R. 391, 294 N. Y. 641, Remittitur R. 394, 295 N. Y. 703).

Statement of the Case

On June 17, 1941, at about 7:00 p. m., a trunk, owned by the petitioners (R. 53), was stolen from the baggage room of respondent's railroad station at Detroit, Mich. (R. 236). It contained, in addition to certain men's cloth-

ing, sample jewelry alleged to be worth $250,000 (R. 8), reduced at the trial to a stipulated market value of $169,078.47 (R. 163). The trunk was delivered to respondent at the instance of Theodore H. Brodie (R. 69), a traveling salesman for (R. 47), and a partner of, the petitioners (R. 107).

Brodie, in the latter part of April, 1941, made an extensive trip from New York to California (R. 48), selling and taking orders for the jewelry contained in the trunk (R. 86). Upon his return in the early part of June, one of the other partners, John M. Hartzberg, continued the selling trip to Boston and then to Philadelphia (R. 84), where he turned the trunk over to Brodie who continued the selling trip to Baltimore, Md., thence to Pittsburgh, Pa., and thence to Detroit, Mich. (R. 48), where he remained for four days. From Detroit, Brodie intended to go to Cleveland, Ohio, and then to Buffalo and finally back to New York City (R. 94).

On each leg of the selling trip, until it was interrupted at Detroit, the trunk was checked as passenger baggage either by Brodie or Hartzberg, at a declared value of $100 (R. 89, 91-2, 104, 123), and Brodie admitted that it was his intention to declare a value of $100 on the trunk when he moved from Detroit to Cleveland (R. 273). Such a declaration permits a passenger to have carried, under the filed tariffs and without additional cost, 150 pounds of baggage between the points called for on his ticket (R. 369-70). The trunk was fully insured and the petitioners were subsequently reimbursed in full by their insurance company (R. 81).

Brodie, on June 17, 1941, as was his usual practice (R. 97), engaged space on a train leaving Detroit at 12:15 a. m., June 18th, through the facilities of the Statler Hotel (R. 98-9, 313, 315, 317-18), of which he was a guest, and then proceeded to have the trunk delivered to the railroad station through the same facilities (R. 68). He then

checked out of the hotel and with one of his customers proceeded to the hotel's dining room (R. 99). It was Brodie's intention to present himself at the baggage room before train time and check his trunk upon his passenger ticket and make the usual declaration of $100 value (R. 273).

Pursuant to Brodie's request, the trunk was delivered to the station at 6:20 p. m. (R. 301). Upon the arrival of the trunk at the station a receipt was issued therefor (Petitioners' Exhibit 14, R. 338) and delivered to Brodie's agent (R. 206). Brodie does not even claim that he issued instructions that the drayman should declare any excess value. The receipt bore the notation that "Baggage liability is limited in accordance with tariff regulations. Excess valuation will be subject to charge of 10 cents for each $100." All reference to this notation is omitted from petitioners' recital of the contents of the receipt (Petition, p. 4). Neither the driver delivering the trunk nor respondent's agent receiving it knew what it contained (R. 292, 207). It was receipted for and handled by respondent's employees as any ordinary trunk moving as baggage on a passenger ticket. Daily through this station over 1,000 pieces of baggage are handled in the same manner (R. 258). Within a moment or two after the receipt of Brodie's trunk (R. 213), another trunk was similarly received and placed beside it (R. 215).

Shortly thereafter, one of respondent's employees, hearing a noise, which he described as though made by the closing of a trunk on the back of an automobile (R. 237), came out of his office and saw a car disappearing with a trunk "sticking out" the rear. Upon investigating, he observed that one of the two trunks which he had seen only five minutes before standing together near the scale, had disappeared (R. 236). Knowing only that the trunk had come from the Statler Hotel (R. 239), it took some five or ten minutes to call the hotel and ascertain the name of the owner. At the hotel, Brodie was paged (R. 100) and finally arrived at the station (R. 102).

Although many investigations have been conducted by private, as well as public police, no trace has ever been found of the missing trunk or its contents.

The pertinent portions of the baggage rules, regulations, rates and charges are set forth in Respondent's Exhibit D (R. 364-373).

Petitioners contended that the liability of the respondent was governed by the prevailing Michigan law with respect to bailment, maintaining that the respondent was liable as a bailee from the time of the delivery of the trunk to it until the owner actually "checked" such trunk on his passenger ticket, or otherwise gave instructions concerning its handling, regardless of its value, and despite the owner's acceptance of a receipt that the trunk was subject to tariff regulations with limited liability. The petitioners maintained that mere delivery of a trunk under such circumstances permitted the owner, subsequent to the delivery, to elect to hold the carrier either as a warehouseman, an intrastate, or an interstate, carrier.

Respondent contended that its liability is that of an interstate carrier, in that the trunk was delivered as baggage for transportation in interstate commerce under the published tariffs of the respondent; that the tariffs are lawful and were properly applied by the courts below.

ARGUMENT

I

The petition shows no special or important reason why the writ should issue.

1. The four subdivisions under point "1", set forth on page 8 of the petition as "Reasons Relied on for the Allowance of the Writ" raise no federal question not heretofore determined by this Court.

Subdivisions "(a)" and "(b)" of that point assume a state of facts not in accord with the evidence. Petitioners

refer to delivery of the trunk for "local storage bailment" or "local storage". This was not Brodie's intention. The court found that:

> "In actuality plaintiffs' trunk was delivered to defendant's baggage room for transportation in interstate commerce from Detroit, Michigan, to Cleveland, Ohio, as baggage upon a passenger ticket which had been reserved for plaintiffs' salesman" (R. 36).

Not only was the truth of this finding undisputed on the trial, but the unanimous affirmance in the two appellate courts of New York would appear to preclude the petitioners from questioning it here. Consequently, any claim that the transaction should be governed by local law may be laid aside.

Subdivisions "(c)" and "(d)", in addition to assuming a state of facts contrary to the evidence, raise questions disposed of by this Court in *Boston & Maine R. R. Co.* v. *Hooker,* 233 U. S. 97 and *Galveston &c. Ry. Co.* v. *Woodbury,* 254 U. S. 357.

There is an element of inconsistent opportunism in the petitioners' petition. The federal question relied on as the basis for this Court's acceptance of jurisdiction is in the Interstate Commerce Act. If, however, jurisdiction is taken by this Court, and the petitioners shall have thus succeeded in crossing the threshold, then, as appears from their petition here and below, the petitioners will invoke the state law of Michigan.

2. Although the petition, points "2" and "3" (page 8), states that the State court has decided federal "questions in a way probably not in accord with applicable decisions of this Court" and "erroneously interpreted and applied the decisions" in the *Hooker* and *Woodbury,* cases, *supra,* no federal case in conflict with the State court's opinion is referred to in the petition. The *Hooker* and *Woodbury* cases were properly applied to the case at bar, as demonstrated later herein.

3. This case does not present federal questions of vital importance as claimed in the petition, point "4" (p. 12). While the record indicates, as stated in the petition, that over 30,000 pieces of baggage were handled at the Detroit station during the month of June, 1941, and that about one-half of 1% were held in the baggage room for 24 hours (R. 258), this in no way demonstrates any misunderstanding or misinterpretation of the tariffs, rules or regulations by the general public or the railroads. All the decision means is that the 7,000 jewelry salesmen who travel on the railroads must declare the excess value of their sample trunks just like other patrons and that no opportunity will be afforded them to claim, after loss occurs, that a trunk delivered for interstate transportation was in "local storage" when lost.

II

The issues in this case were decided by the lower Courts upon well recognized and established precedents of this Court.

The Trial Court found that the delivery of the trunk to the respondent was an incident to transportation in interstate commerce and liability for the loss must be resolved by the provisions of the Interstate Commerce Act, the carrier's tariffs and rules filed pursuant thereto and the decisions interpreting and applying the same (R. 36).

This Court has held that where the character of the commerce—interstate or intrastate—is in issue, the intention of the shipper is an element, superior even to the actual contract made with the carrier, in determining the essential character of the commerce. (*B. & O. S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, 171; *Atlantic Coast Line R. R. Co.* v. *Standard Oil Co.,* 257 U. S. 257, 268.) The courts look to the intention of the parties at the time of the delivery of goods to determine the rights and obligations

between them (*Blossom* v. *Griffin*, 13 N. Y. 569, 572; *Ladue* v. *Griffith*, 25 N. Y. 364, 367; *Wade* v. *Wheeler*, 3 Lansing 201, 204, aff'd. 47 N. Y. 658; *Coyle* v. *Western R. R. Corp.*, 47 Barb. 152, 153). Where goods are delivered under circumstances indicating that they are to be carried, it is presumed that they are received by the carrier, as such, and not as a warehouseman (*Rogers* v. *Wheeler*, 52 N. Y. 262, 266; *Witbeck* v. *Holland*, 45 N. Y. 13). If there is any dispute as to whether the goods were delivered for carriage or storage, such dispute is for the fact finding tribunal (*Judson* v. *Western R. R. Corp.*, 4 Allen 520, 525, 527).

Interstate "transportation begins * * * when the merchandise has been placed in the possession of a carrier." (*Penna. R. R. Co.* v. *Pub. Utilities Com. of Ohio*, 298 U. S. 170, 175.) Transportation in interstate commerce is governed by federal law, *i. e.*, the Interstate Commerce Act. "Transportation" as the word is used in the Act, is defined as including "all services in connection with the receipt, delivery, * * * storage, and handling of property transported" (49 U. S. C. Sec. 1 (3)). This definition in and of itself indicates that interstate transportation of property includes every phase reasonably connected with such transportation of property, from the time of its initial delivery to the carrier, to its final redelivery to the passenger.

The Act provides that no carrier shall engage in the transportation of passengers or property "unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published" and that no carrier shall "extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs" (49 U. S. C. Sec. 6 (7)).

The respondent filed its tariff schedules and duly published the same (R. 364-373).

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, bind-

ing as such upon Railroad and shipper alike." (*Penna. R. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 197.) To the same effect:

Lowden, et al., Trustees v. *Simonds-Shields Lansdale Grain Co.*, 306 U. S. 516;
Louisville & Nashville R. R. Co. v. *Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, 234;
Keogh v. *Chicago, Northwestern Rwy. Co.*, 260 U. S. 156;
Geo. Fla. & Ala. Ry. v. *Blish Co.*, 241 U. S. 190, 197;
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Louisville & Nashville R. R. Co. v. *Maxwell*, 237 U. S. 94;
Great Northern Rwy. Co. v. *O'Connor*, 232 U. S. 508.

The Second Cummins Amendment to the Interstate Commerce Act expressly exempts baggage from the provisions of the Act respecting a carrier's liability for full actual loss (49 U. S. C. Sec. 20 (11); *Culbreth* v. *Martin, et al.*, 179 N. C. 678, 103 S. E. 374).

The cases of *Boston & Maine R. R. Co.* v. *Hooker*, 233 U. S. 97 and *Galveston &c. Ry. Co.* v. *Woodbury*, 254 U. S. 357, have determined all questions raised by the petitioner. In the *Hooker* case this Court decided in favor of the carrier the question of the legality of baggage tariffs limiting liability to a specified amount, unless a higher value was declared and charges paid therefor at the time of delivery, in connection with the transportation of baggage on a passenger ticket from Boston, Mass. to Sunapee Lake Station, N. H. It was held that the shipment, being in interstate commerce, was controlled by the provisions of the Interstate Commerce Act, and the amendments thereto; that a carrier could limit its common law liability in the transportation of baggage by the filing of rules so prescribing;

that both the passenger and the carrier must take notice of such rules from and after the date of their filing; that knowledge of the passenger that the rate is based on value is to be presumed from the schedules filed with the Commission; that such rules are binding on passenger and carrier, even though the passenger had no knowledge thereof, and even though the carrier made no inquiry as to the value although the outward appearance of the baggage indicated a greater value; that service performed contrary to the rules was absolutely prohibited as discriminatory and unlawful; that regardless of the negligence of the carrier, such rules were, nevertheless, applicable and binding; that a carrier's rule limiting its liability to $100 unless a higher value is declared and charges paid therefor at the time of delivery, was lawful and just; that as no value was declared, the passenger was limited to the amount specified in the rule; and the reasonableness of the charges specified in the tariffs could only be attacked before the Commission.

In the *Woodbury* case, this Court cited the *Hooker* case, *supra,* and found that the Cummins Amendment (Act of March 4, 1915, c. 176, 38 Stat. 1196, as amended by the Act of August 9, 1916, c. 301, 39 Stat. 441, now embodied in 49 U. S. C. sec. 20 (11)) enacted subsequent to the *Hooker* decision did not, in anywise, alter the rule for liability for baggage and limited a plaintiff to a $100 recovery in the absence of a declaration of a higher value and payment of excess charge.

While a limitation as to value does not release a carrier from negligence, its liability in such case will not extend beyond the limited value (*Hart* v. *Penn. R. R. Co.*, 112 U. S. 331).

Even if Brodie had dissented from the limitation of liability in respect to the baggage delivered by him to the respondent, it would have been immaterial, since, by his purchase of a ticket for transportation in interstate commerce and his delivery of the baggage to the respondent with or without "checking", the rights of the parties became fixed by law which imposed upon each of them

the terms and conditions of the contract and could not be set aside unless changed, not by the courts, but by the Interstate Commerce Commission. As was said by Mr. Justice Brandeis in *Western Union Tel. Co.* v. *Esteve Bros. & Co.*, 256 U. S. 566, at page 572:

> "Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect. This principle was established in cases involving the limitation upon a carrier's liability for baggage by *Boston & Maine Railroad* v. *Hooker*, 233 U. S. 97, and *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Woodbury*, 254 U. S. 357."

Quite aside from the obvious propriety of the maximum limitation of the $2,500 valuation for a passenger's baggage (transportation by express being available) the fact remains that any suggestion of invalidity in such limitation is immaterial in this case. A similar argument was advanced in the *Western Union* case, *supra*, but was disposed of in that case as not raised by the facts before the court. The same is true in this case. Brodie admitted it was his intention to check the trunk to Cleveland upon his passenger ticket and make the usual declaration of $100 value (R. 273).

CONCLUSION

The application for a writ of certiorari should be denied.

FREDERICK L. WHEELER,
Attorney for Respondent.

C. AUSTIN WHITE,
of Counsel.

May 7, 1946.

MAY 16 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945

No. 1123

JOHN M. HARTZBERG and LOUIS HARTZBERG, co-partners doing business under the firm name and style of J. & L. HARTZBERG,

Petitioners,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

PETITIONERS' REPLY BRIEF

HENRY H. SHEPARD,
JOSEPH M. PROSKAUER,
Counsel for John M. Hartzberg and Louis Hartzberg, copartners doing business under the firm name and style of J. & L. HARTZBERG,
Petitioners.

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IN THE

Supreme Court of the United States

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No. 1123

JOHN M. HARTZBERG and LOUIS HARTZBERG, co-partners doing business under the firm name and style of J. & L. HARTZBERG,

Petitioners,

v.

THE NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

REPLY BRIEF ON BEHALF OF J. & L. HARTZBERG, PETITIONERS.

1. The respondent contends that petitioners are precluded from questioning here the finding of the State Court that interstate transportation had begun (R. 36).

Unless the fact of delivery to the baggage room with an undisclosed intention thereafter to enter into a contract of carriage is evidence from which the beginning of interstate transportation can be inferred, there is no evidence to support the court's finding that such transportation had begun. It is undisputed that, in fact, no such contract was ever made, the intention neither having been disclosed to respondent nor carried out.

Petitioners urge as a matter of law that such transportation does not begin until at least a contract of carriage has been made.

The cases cited at the top of page 7 of respondent's opposing brief show that property is neither delivered to nor received by a carrier as such for transportation unless the destination thereof and instructions to transport to said destination have been disclosed to the carrier and the carrier has expressly or impliedly undertaken to transport the property to its destination without further instructions. In *Blossom* v. *Griffin,* 13 N. Y. 573, cited by respondent, the Court held that property was "received for transportation" by the carrier, "if the deposit of the goods in the warehouse is a mere accessory to the carriage, in other words, if they are deposited for the purpose of being carried without further orders." In that case, the property, when received by the carrier, had the destination marked thereon, and expressed on the carrier's receipt, according to a general arrangement previously entered into between the parties. In *Ladue* v. *Griffith,* 25 N. Y. 364, cited by respondent, the Court held that property was "delivered for transportation" when it was delivered on board the carrier marked and consigned to a disclosed destination. In *Witbeck* v. *Holland,* 45 N. Y. 13, cited by respondent, the carrier's receipt disclosed the identity of the consignee and the destination of the property. In *Rogers* v. *Wheeler,* 52 N. Y. 261, cited by respondent, the bill of lading contained the name and address of the consignees, and the Court held that receipt of the property by a carrier with such knowledge shows that it was received as carrier for carriage to the destination disclosed, no further orders being required. *In Coyle* v. *Western R. R. Corp.,* 47 Barb. 153, the barrels were directed to a person residing in a city upon the railroad, and the shipper gave the railroad an order for its transporation to such person. Accordingly, the Court held that the railroad assumed the relation of carrier from the time of acceptance of the shipper's order for transportation. To the same effect is *Wade* v. *Wheeler,* 3 Lans. 201, affirmed 47 N. Y. 658.

When petitioners' trunk was delivered to respondent's station, it was consigned only to the station by the transfer company's claim check attached thereto (Petitioners' Exhibit 10, R. 335). Respondent's receipt therefor issued to the transfer company (Petitioners' Exhibit 14, R. 338) recited as the only destination of the trunk the very station at which it was received. Concededly respondent had no knowledge or notice of any other contemplated destination or of any fact with respect to the trunk other than "that the trunk had come from the Statler Hotel" (Respondent's brief, p. 8), and that it was subject to transfer company claim check No. 7318. In such a case, it cannot be urged that the carrier had received the trunk for interstate transportation or that the trunk was delivered to the baggage room for transportation in interstate commerce from Detroit, Michigan to Cleveland, Ohio, as baggage upon a passenger ticket which had been reserved for the holder of the claim check, despite the inchoate expectation of the holder of such check. The so-called finding of the State Court to the contrary is without support in the record or in law. It must be disregarded by this Court upon a proper analysis of the facts. *Hooven & Allison Co.* v. *Evatt,* 324 U. S. 652, 659. See also, *Southern Pacific Co.* v. *State of Arizona,* 325 U. S. 761, 771; *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 593; *Postal Telegraph Cable Co.* v. *Newport,* 247 U. S. 464, 473.

2. Federal questions are involved:

(a) The extent to which Congress has legislated as to a matter which would otherwise be governed by State law;

(b) If Congress has legislated as to the facts at bar, the proper construction of such legislation as applied to those facts.

These questions may not be determined solely by the character of the commerce—interstate or intrastate—as claimed by respondent (Respondent's brief, p. 6).

3. *B. & O. S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, 171, and *Atlantic Coast Line R. R. Co.* v. *Standard Oil Co.,* 275 U. S. 257, 268, do not hold that interstate transportation begins because of a prospective shipper's inchoate expectation.

The question there was whether property shipped from a point of origin in one state to a point in a second state, and then reshipped to a point of destination in the second state, was subject to the lawful interstate rate applicable to shipments from point of origin to point of destination or subject to the combination of the interstate rate to the point of reshipment and the local rate from the point of reshipment to destination, when it was intended at the point of origin that the property would be shipped in this manner to the point of destination to evade payment of the lawful through rate. In those cases, the Court held that the completed shipment was a through shipment, despite the separate contracts made, if it was so intended by the shipper, and *if such intention was in fact carried out.* In those cases, there was no element of frustrated purpose, or of the progress of "clearly defined plans" having been "aborted" by any intervening theft (R. 34). As this Court stated (260 U. S. 166 at p. 171):

> "* * * *the original intention persisted in was carried out.* * * * Under these circumstances, *the intention as it was carried out determined, as matter of law, the essential nature of the movement;* and hence that the movement through to Madisonville was an interstate shipment." (Italics supplied.)

And at pages 172 and 173 (260 U. S.) it appears that "The sole question, therefore, which could arise in this case,

was whether the movement actually entered upon at point of origin, and *persisted in,* was transportation of the lumber to Madisonville'' ''The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began * * *. The distinction is clear between the cases of that character and the one at bar, where the essential nature of the traffic as a through movement to the point of ultimate destination is shown by the *original and persisting intention of the shippers which was carried out.''* (Italics supplied.)

Mere intent that property delivered to a carrier's depot was to be destined to a point outside the state does not place such property in interstate transportation or even in interstate commerce unless and until the contemplated interstate movement actually takes place. *Oregon-Washington R. R. & Nav. Co.* v. *Strauss* & Co., 73 F. 2d 912, 915; *Oregon-Washington R. R. & Nav. Co.* v. *Farmers Nat. G. Corp.,* 25 F. Supp. 667; *Hughes Bros. Timber Co.* v. *Minnesota,* 272 U. S. 469, 475; *Minnesota* v. *Blasius,* 290 U. S. 1, 9. Transportation which, isolatedly considered, takes place wholly within a state, is not to be deemed part of interstate commerce because the shipper, unknown to the carrier, contemplated a subsequent movement of the same traffic to a point outside of the state, when such contemplated subsequent movement never takes place, and is never arranged for with or disclosed to the carrier. See *Davis* v. *Phillips,* 27 Ga. App. 814, 109 S. E. 924. A case in point is *Federal Compress Co.* v. *McLean,* 291 U. S. 17. By agreement, the appellant's warehouse was used by a railroad as its cotton depot, and the appellant was designated as the agent of the railroad to receive the cotton from prospective shippers, store, compress, and bale, and load and unload the cotton upon and from its cars. Upon delivery of cotton to it,

appellant issued its negotiable warehouse receipts. The right to demand delivery of the cotton or otherwise control its disposition was reserved to the holders of the receipts. Upon shipping orders being given by the holders of the receipts, appellant compressed and baled the cotton and delivered the bales to the rail carrier for interstate shipment. The movement of the cotton out of the warehouse was directed by the holders of the receipts. Its destination was not determined until the owner gave shipping instructions to appellant and shipment was not made until surrender of the warehouse receipts. The compress charges were paid by the carrier, and added to the charge for carriage, and in the case of cotton brought to the warehouse by rail carriage, the through interstate rail rate was applied from the point of origin to destination instead of the combination rate. This Court said (p. 21):

> "It is clear that by all accepted tests the cotton while in appellant's warehouse, has not begun to move in interstate commerce. * * * When it comes to rest there, its intrastate journey, whether by truck or by rail, comes to an end, and although in the ordinary course of business the cotton would ultimately reach points outside the state, its journey interstate does not begin * * * until its shipment to points of destination outside the state. Before shipping orders are given, it has no ascertainable destination without the state, and in the meantime, until surrender of the warehouse receipts, it is subject to the exclusive control of the owner."

Penna. R. R. Co. v. *Pub. Utilities Com. of Ohio,* 298 U. S. 170, 175, cited at page 7 of respondent's brief, does not hold to the contrary.

4. The cases of *Culbreth* v. *Martin,* et al., 179 N. C. 678, 103 S. E. 374; *Boston & Maine R. R.* v. *Hooker,* 233

U. S. 97; and *Galveston Ry. Co.* v. *Woodbury,* 254 U. S. 357, relied upon by respondent, do not dispose of the questions raised here. In the *Martin* case, the defendant was the Director General of Railroads, who operated the railroad involved under federal control. Liability in such case was subject to Federal Law and the tariffs filed with the Interstate Commerce Commission, even in instances where such liability would have been subject to State law but for the fact of such Federal control (see: *Missouri P. R. Co.* v. *Boone,* 270 U. S. 466; *Lancaster* v. *Smith* [Tex. Civ. App.] 244 S. W. 1076). In the *Hooker* case there was no holding that a carrier's rule limiting its liability unless a higher value was declared and charges paid "at the time of delivery" (Respondent's brief, p. 9) was lawful and just. The rule there approved is set forth in the opinion (233 U. S. 97) at page 124 as follows:

> "'Baggage liability is limited to personal baggage not to exceed one hundred dollars in value * * * unless a greater value is declared and stipulated by the owner and excess charges paid at *time of checking* the baggage;' * * * Plaintiff did not declare and stipulate *at the time the baggage was checked* that it exceeded $100 in value, and did not pay any charge for valuation in excess of that amount." (Italics supplied.)

So in the *Woodbury* case, plaintiff there "checked her trunk which she took with her." For failure to declare a higher value and pay excess charges when she checked her trunk, liability was limited.

5. The argument that full liability should be denied because the Act (49 U. S. C., Sec. 6 [7]) prohibits any privilege or facility in transportation of property except as are specified in the tariffs, is specious. This Court has imposed full liability where the tariff limitations were

held invalid or inapplicable. *Union Pacific R. R.* v. *Burke,* 255 U. S. 317, 321; *Boston & Maine R. R.* v. *Piper,* 246 U. S. 439; *Cincinnati &c Co.* v. *Rankin,* 241 U. S. 319. The attempted use of a similar argument to impose the tariffs filed with the Interstate Commerce Commission upon intrastate transactions has been rejected by this Court in the absence of a proper finding and order by the Interstate Commerce Commission. *Minnesota Rate Cases,* 230 U. S. 352, 419, 432-433; *Houston & Texas Railway* v. *United States,* 234 U. S. 342, 355-8. The only commission orders applying the respondent's tariff to intrastate transactions are those set forth at R. 365, with respect to New York and Ohio. No order is shown to have been made applicable to Michigan.

6. Respondent contends (Respondent's brief, p. 9) that Brodie's purchase of a ticket for transportation in interstate commerce and his delivery of the baggage to the respondent "without 'checking' " fixed the rights of the parties by law which imposed upon each of them the terms and conditions of the limited liability contract, and dissent from the limitation of liability by Brodie would have been immaterial. The only authority cited is *Western Union Tel. Co.* v. *Esteve Bros & Co.,* 256 U. S. 566, which relies on the *Hooker* case and the *Woodbury* case, both involving checked baggage. It is not the purchase of the ticket and delivery of the trunk *per se* which fixes the contract, but the acceptance and use of the ticket by checking the trunk thereon for transportation as baggage. *N. Y. Central &c R. R.* v. *Beaham,* 242 U. S. 148, 151. Upon such acceptance and use, Brodie would have been afforded an opportunity to dissent from the limitation by declaring a higher value, since, as respondent has conceded in the State Court, after Brodie had caused the transfer company to deliver the trunk to respondent "All that remained for Brodie to do was to appear at the Detroit station and exchange his transfer check for a railroad

check. At that time * * * he * * * could have declared in writing a greater value." Non-action prior to such acceptance and use could neither imply assent to nor preclude dissent from the asserted limitation.

7. There is no obvious propriety in the maximum limitation of the $2,500 valuation for a passenger's baggage (Respondent's brief, p. 10). The *Western Union* case (256 U. S. 566), relied upon by respondent, is not a valid precedent. It is a telegraph case, clearly distinguishable from a bailment or carrier case. It was so distinguished by this Court, which stated (256 U. S. at p. 574) that "It is by no means clear" that the rule of the *Burke* case, 255 U. S. 317 "established for common carriers of goods—should be applied to telegraph and cable companies", citing the *Primrose* case, 154 U. S. 1, 14. Since Brodie could not obtain full protection by declaring the full value of the contents of his trunk, $2,500 protection was as improvident, insufficient and inadequate as was $100 protection for property worth $169,078.47, and his intention, unknown to respondent, to declare only $100 was based on and compelled by respondent's illegal prohibition of declarations of value in excess of $2,500. Brodie's undisclosed intention based on this illegal rule is no defense to the respondent for its proclamation of such illegal rule. See *Borden* v. *New York Cent.* R. Co., 98 Misc. 574.

8. Respondent's brief (p. 4) makes reference to "the owner's acceptance of a receipt that the trunk was subject to tariff regulations with limited liability", which receipt, it is claimed, was "delivered to Brodie's agent (R. 206)" (Respondent's brief, p. 3). It is undisputed in the record that this receipt was delivered only to the transfer company's driver and retained by the transfer company as its permanent record (R. 295, 296, 359) and was never seen by Brodie. The transfer company's

driver was not Brodie's agent in this respect, and the statement in respondent's brief is incorrect. Brodie was not bound by any notation thereon, and no assent can be implied from the delivery thereof to and its retention by the transfer company. *Merriman* v. *The May Queen*, 17 Fed. Cas. 136; *Hill* v. *Adams Express Co.*, 77 N. J. L. 19; *New* v. *Chicago, Rock Island &c R. Co.*, 171 Ill. App. 488; *Grice* v. *Oregon-Washington R. & Navigation Co.*, 78 Or. 17, aff'd 78 Or. 17.

9. The arguments made by respondent confirm the existence of Federal questions of substance which, it is submitted, have been erroneously decided by the New York State Courts. Such questions are reviewable by this Court by certiorari under Section 237 (b) of the Judicial Code, as amended. *Mo. Pac. R. Co.* v. *Hartley Bros.*, 290 U. S. 576; *Chicago & N. W. Ry Co.* v. *Bolle*, 284 U. S. 74; *N. Y., N. H. & H. R. Co.* v. *Bezue*, 284 U. S. 415.

Conclusion

WHEREFORE, your petitioners pray that their petition for a writ of certiorari should be granted, and that the judgment entered in the Supreme Court of the State of New York, County of New York, should be reversed.

HENRY H. SHEPARD,
JOSEPH M. PROSKAUER,
Counsel for John M. Hartzberg and Louis Hartzberg, copartners doing business under the firm name and style of J. & L. HARTZBERG,
Petitioners.

May 15th, 1946.